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ONG LED SENG v. LEE KAM SUN & ORS

HIGH COURT MALAYA, SHAH ALAM
TEE GEOK HOCK JC
[WRIT OF SUMMONS NO: BA-22NCVC-277-06-2018]
20 JANUARY 2022

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Abstract – *The rule of pleading accords with the fundamental rule of natural justice ie the right to be informed of any adverse point so that one has the opportunity to state the answer. Equally important is that material facts that supported the claim must be pleaded and failure to do so may be fatal. A claim based on unpleaded material facts could not be allowed to succeed, and indeed, must necessarily fail.*

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CIVIL PROCEDURE: *Statement of claim – Pleadings – Claimant's cause of action premised upon fraudulent conspiracy to cheat and unjust enrichment – Whether causes of action sufficiently pleaded and established in statement of claim – Whether requirements of pleadings complied with – Whether there was radical departure from pleadings – Whether new issues raised ought to be entertained*

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The plaintiff commenced the present suit against (i) the first defendant, as the original beneficial owner of a shophouse; (ii) the land office ('second defendant') which processed the registration of transfer of the shophouse to the third defendant's name; and (iii) the third defendant, the registered proprietor of the shophouse. In his statement of claim ('SOC'), the plaintiff alleged that (i) there was a transaction between the plaintiff and the first defendant *inter se* and complained of the first defendant's acts and conducts; (ii) the third defendant lacked the financial capacity to buy the house and this was evidence of suspicion and conspiracy; (iii) the first and second defendants, specifically, and the defendants, generally, conspired to cheat the plaintiff; (iv) there existed fraudulent conspiracy between the defendants to refuse to register the title of the shophouse in the plaintiff's name, who was allegedly a *bona fide* purchaser and, instead, the shophouse was sold to the third defendant; and (v) there was unjust enrichment of the first defendant in connection with the shophouse. Among the reliefs sought by the plaintiffs were (i) a declaration of validity of the sale and purchase agreement ('SPA') between the plaintiff and the first defendant; (ii) specific performance of the SPA and, *in lieu* of the same, damages; (iii) an order directing the first defendant to sign and execute the transfer of document and other necessary documents in favour of the plaintiff and, alternatively, refund of the purchase price and redemption of the sum paid; (iv) an order directing the second defendant to return all the security documents of the transaction in the possession of the second defendant to the plaintiff; and (v) an order restraining the defendants from lodging a caveat or allowing any caveat on the shophouse. In its defence and counterclaim, the third defendant prayed for general and special damages against the plaintiff for commencing this suit

which allegedly prejudiced the third defendant's credit rating and the third defendant's ability to make subsequent dealings with the shophouse. In the plaintiff's written submissions, he summarised the main issues as: (i) whether there was a valid SPA between the first defendant and the plaintiff and whether the plaintiff paid the purchase price towards the redemption sum of the property ('first issue'); (ii) whether from the full payment towards the purchase price of the property, including settling the redemption sum of the property by the plaintiff to the first defendant, and whether the first defendant had become a bare trustee of the property even though the first defendant was only a beneficial owner at the material time until the registration of the name of the plaintiff as the registered owner ('second issue'); (iii) whether the first defendant was permitted in law to sell or transfer the land to a new purchaser *ie*, the third defendant, after executing the SPA with the plaintiff and becoming a bare trustee ('third issue'); (iv) whether the third defendant's registered title or interest in the property was defeasible and liable to be set aside ('fourth issue'); (v) whether the second defendant, upon rejection for registration, ought to have returned back the documents/original documents given to the second defendant for presentation purposes back to the plaintiff's solicitors ('fifth issue'); and (vi) whether the third defendant had any merits in its counterclaim ('sixth issue').

Held (dismissing claims against second and third defendants; dismissing third defendant's counterclaim):

(1) The plaintiff had not expressly prayed for a declaration of the invalidity of the registration of the transfer in favour of the third defendant. In the premises, the plaintiff failed to comply with the requirements of pleadings. The plaintiff's specific causes of action pleaded in his SOC were fraudulent conspiracy to cheat and/or alternative restitution under unjust enrichment. There was no express or specific pleading of any other alleged exception under s. 340(2) of the National Land Code ('NLC'). The word 'trust' or 'bare trustee' was never mentioned in the SOC. Moreover, the plaintiff did not plead the specific facts or circumstances which were alleged to give rise to the alleged 'trust' or 'bare trustee'. In the premises, the plaintiff was not allowed to argue on the cause of action in trust or bare trustee. Any cause of action in trust or bare trustee would constitute a radical departure from the pleadings and was not just a variation, modification or development of what had been alleged in the pleadings. In the premises, the plaintiff also failed to clear the second hurdle to his defective pleadings and this was yet a second ground which, by itself, warranted the court's refusal to entertain his basis of claim on trust or bare trustee. On the point of pleadings, in the circumstances, the second to fourth issues would not be allowed to be entertained. (paras 27, 29 & 55)

(2) The plaintiff's attempt to argue his case based on grounds of alleged illegality was not accepted. For the court to consider an issue of illegality, without it having been expressly pleaded, the illegality must appear *ex facie* on the transaction documents. The shophouse was not on a Malay reserve land and there was nothing *ex facie* illegal in the SPA for the shophouse between the first and third defendants. As such, *ex facie* illegality as an exception to the requirement of pleading did not apply to the SPA for the shophouse. The plaintiff's claims had to be considered and decided on his pleaded causes of action in fraudulent conspiracy to cheat and in unjust enrichment and not on any other cause of action or alleged ground for defeating the third defendant's indefeasibility of registered title. (paras 31 & 32)

(3) The plaintiff failed to (i) plead the alleged fraudulent conspiracy with requisite particularity required by law; (ii) prove that there was any combination or agreement between the second defendant and either of the first or third defendant in connection with the registration of caveats, rejection of the plaintiff's caveat presentation, rejection of the plaintiff's transfer presentation and/or the registration of transfer presented by the second defendant; (iii) prove that there was any combination or agreement between the second defendant and either of the first or third defendant to injure the plaintiff or that there was any act done pursuant to such combination or agreement. The plaintiff's claim of alleged fraudulent conspiracy against the second and third defendants was dismissed, leaving the first defendant as the only remaining co-defendant against whom alone there could be no basis for finding any cause of action in fraudulent conspiracy. Fraudulent conspiracy could only possibly exist where there are two or more persons who made an agreement or combination to injure and have acted in pursuance of that combination or agreement to cause injury. With the first defendant as the only co-defendant, the plaintiff's claim of fraudulent conspiracy against the first defendant also failed. (paras 37, 39, 40, 53, & 54)

(4) The third defendant was a *bona fide* purchaser for valuable consideration. Although the third defendant was not a subsequent purchaser, the plaintiff had not proved any case of exception under s. 340(2) of the NLC to justify the court in defeating the registered title of the third defendant. As the third defendant had been registered as the proprietor of the shophouse and the plaintiff failed to prove its case of alleged fraudulent conspiracy, the third defendant's registered title was indefeasible because no exception to indefeasibility under s. 340(2) of the NLC had been proved and, therefore, the position remained under the general rule of indefeasibility of registered title under s. 340(1) of the NLC. (paras 65 & 66)

(5) The plaintiff made allegations of unjust enrichment only *vis-a-vis* the first defendant. There was no pleading or prayer for damages for unjust enrichment against the second or third defendants. There was also no evidence that the third defendant had, in any way, been enriched after having paid RM3,300,000 as the price for the shophouse and, after having been burdened with the repayment obligations in respect of the bank loan taken for the purchase of the shophouse. The plaintiff also failed to produce any evidence to prove that the third defendant's purchase price paid to the first defendant was at any discount below the fair market value of the shophouse. The plaintiff failed to prove that the third defendant had been enriched or that the enrichment, if any, was in any way unjust. The plaintiff's claim of alleged unjust enrichment against the second and third defendants was dismissed. As regards the plaintiff's claim of unjust enrichment against the first defendant, the plaintiff had not produced documentary proof of the alleged payments to have been made to the first defendant. However, in view of the first defendant's default in appearance and defence, the plaintiff was granted judgment in default against the first defendant in respect of unjust enrichment with damages to be assessed. (paras 75-79 & 91)

(6) The third defendant's witnesses had not adduced specific evidence regarding the alleged losses or damages of the third defendant. The third defendant's counterclaim for damages was not allowed. (paras 88 & 89)

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors And Another Case [1995] 3 CLJ 639 CA ***(refd)***

AmBank (M) Bhd v. Luqman Kamil Mohammed Don [2012] 3 CLJ 551 FC ***(refd)***

Associated Leisure Ltd (Phonographic Equipment Ltd) & Ors v. Associated Newspapers Ltd [1970] 2 QB 450 ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Cubic Electronic Sdn Bhd (In Liquidation) v. MKC Corporate & Business Advisory Sdn Bhd & Another Appeal [2016] 3 CLJ 676 CA ***(refd)***

Danga Bay Sdn Bhd v. Hamimah Hussin & Ors; Affin Islamic Bank Bhd (Third Party) [2020] 1 LNS 1777 CA ***(refd)***

Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd [1987] 1 CLJ 123; [1987] CLJ (Rep) 102 SC ***(refd)***

He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal [2020] 7 CLJ 271 FC ***(refd)***

Iftikar Ahmed Khan v. Perwira Affin Bank Bhd [2018] 1 CLJ 415 FC ***(refd)***

Joseph Paulus Lantip v. Tnio Chee Chang & Another Appeal [2020] 4 CLJ 79 CA ***(refd)***

Muniandy & Anor v. Muhd Abdul Kader Muhd Saheed & Ors [1989] 2 CLJ 577; [1989] 1 CLJ (Rep) 116 SC ***(refd)***

Samuel Naik Siang Ting v. Public Bank Bhd [2015] 8 CLJ 944 FC ***(refd)***

See Leong Chye & Anor v. United Overseas Bank (Malaysia) Bhd & Another Appeal [2021] 6 CLJ 650 FC ***(refd)***

A *Superintendant Of Land And Survey Department Kuching-Divisional Office & Anor v. Ratnawati Hasbi Mohamad Suleiman [2020] 2 CLJ 425 FC* ***(refd)***
Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor [1993] 4 CLJ 476 HC ***(refd)***
Tan Chee Hoe & Sons Sdn Bhd v. Code Focus Sdn Bhd [2014] 3 CLJ 141 FC ***(refd)***
Ting Ung Tuang v. Lau Tiong Ik Construction Sdn Bhd [2001] 4 CLJ 116 HC ***(refd)***
Wisma Punca Emas Sdn Bhd v. Dr Donal R O'Holohan [1986] 1 LNS 46 SC ***(refd)***
B *Yeo Ping Tieng & Ors v. Elitprop Sdn Bhd [2020] 1 CLJ 776 FC* ***(refd)***
Zung Zang Wood Products Sdn Bhd & Ors v. Kwan Chee Hang Sdn Bhd & Ors [2014] 2 CLJ 445 FC ***(refd)***

Legislation referred to:
Companies Act 2016, s. 132C
C National Land Code, s. 340(1), (2), (3)

For the plaintiff - John Henry Louis; M/s John & Assoc
For the 1st & 2nd defendants - Norazlin Mohamad Yusoff
For the 3rd defendant - Ong Keng Swee; M/s KS Ong & Co

Reported by Najib Tamby

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JUDGMENT
(Encl. 1)

Tee Geok Hock JC:

Introduction

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[1] The importance of pleadings and pre-action research into the applicable law cannot be over-emphasised as is exemplified by the outcome of the present case.

[2] Where a statute provides for some comparatively less burdensome
F requirements for an entitlement to a statutory remedy than what has been imposed under the common law, a claimant's election to plead his case under the common law causes of action based upon fraud may sometimes prove to be detrimental to the claimant's case.

[3] In his effort to claim proprietary rights *vis-à-vis* the registered
G proprietor, the plaintiff in our present case has pleaded causes of action against the defendants under the common law for fraudulent conspiracy to cheat the plaintiff; and for the equitable remedy of unjust enrichment in connection with a 4½ storey shophouse ("the said shophouse") while neglecting to plead any cause of action under any of the other exceptions to
H the indefeasibility of registered title in sub-s. 340(2) of the National Land Code.

Background

[4] The first defendant is the beneficial owner of an intermediate 4½
I storey shophouse held under Hakmilik No.: HSD 86348, Nombor Lot: PT31, Seksyen 62, Bandar Kuala Lumpur, dalam Daerah Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur ("the said shophouse").

[5] The said shophouse was one of the residuary estate of Liew Ah Chin, the late mother of the first defendant. The first defendant and his wife, Ewe Chooi Lian were the joint executors of the deceased's estate including the said property. The first defendant obtained a grant of probate on 28 July 2011. (AA1/1-AA1/8). A

[6] The plaintiff's pleaded causes of action against the defendants are (i) fraudulent conspiracy to cheat the plaintiff; and (ii) unjust enrichment in connection with a 4½ storey shophouse ("the said shophouse"): see paras. 14 to 26 especially paras. 24 to 26 of the statement of claim. B

[7] In the present suit, the plaintiff sued the first defendant as the original beneficial owner of the said shophouse, the second defendant as the land office which processed the registration of transfer of the said shophouse to the third defendant's name and the third defendant who has become the registered proprietor of the said shophouse since several years ago. C

[8] The reliefs prayed for by the plaintiff against the first defendant are for declaration of validity of the sale and purchase agreement dated 19 January 2012 between the plaintiff and the first defendant, for specific performance of the said agreement and *in lieu* thereof, damages, for an order directing the first defendant to sign and execute the transfer document and other necessary documents in favour of the plaintiff and alternatively refund of the purchase price and redemption sum paid; and/or damages as may be ordered by the court (see sub-paras. 27(b) to 27(d), 27(g), 27(h) and 27(j) of the statement of claim). In sub-para. 27(f) of the statement of claim, the plaintiff prayed for order directing the second defendant to return all the security documents of the transaction in the possession of the second defendant to the plaintiff. Subparagraph 27(i) of the statement of claim relates to the plaintiff's prayer for an order restraining the defendants or their agents from lodging caveat or allowing any caveat on the said shophouse. D E F

Full Trial

[9] At the full trial, the plaintiff called three witnesses, namely Justin Too Wai Hong (Solicitor in Messrs Khor Rafidah) ("WS-PW1"), Ong Led Seng (plaintiff) ("WS-PW2") and Low Ah Chai, (Manager in Messrs John & Associates) ("WS-PW3"). G

[10] The second defendant called two witnesses, namely Nor Azura binti Abdul Rahman (Registration Assistant Director with the second defendant) ("WS-DW3") and Azmizal Ahmad Basri, (Investigation Officer from IPD Sentul) ("WS-DW4"). H

[11] The third defendant called two witnesses, namely Cheah Chi'a Ngi (Director in the third defendant company) ("WS-DW1") and Benny Soh Seow Leng (Solicitor in Messrs Manjit Singh Sahdev), ("WSD-WS2"). I

[12] The following cause papers were filed and were marked during the full trial as follows:

Cause Papers:

Enclosure 61: Ikatan pliding (plaintif & defendan ke-2) (BOP (D2))

Enclosure 17: Ikatan pliding (BOP(D3))

Common Bundle Of Documents:

Enclosure 103: Ikatan dokumen bersama bahagian A pp 1-8 (AA1/1 - AA1/8),

Enclosure 103: Ikatan dokumen bersama bahagian B pp. 9-62 (AA1(B)/9-AA1(B)/62),

Enclosure 103: Ikatan dokumen bersama bahagian B pp. 63-230 (AB1/63-AB1/230),

Enclosure 89: Ikatan dokumen tambahan bahagian A (AA2)

Enclosure 90: Ikatan dokumen bersama tambahan bahagian B (AB2).

Statement Of Agreed Facts & Issues To Be Tried

Enclosure 55: Statement of agreed facts between plaintiff & second defendant – (SAF (D2))

Enclosure 57: Statement of agreed facts between plaintiff & third defendant (SAF (D3))

Enclosure 84: Statement of issues to be tried between plaintiff and second defendant (SIT(D2))

Enclosure 22: Statement of issues to be tried between plaintiff and third defendant (SIT(D3)).

[13] Pages 9 to 62 of encl. 103 was amended in marking as AA1(B)/9 to AA1(B)/62 on 16 November 2021 upon the completion of the full trial with the unanimous agreement of all the parties because after discussions, consultations and re-examining the said pp. 9 to 62 of encl. 103, all the parties realised that their respective solicitors had previously misunderstood the legal effect of including documents in Part A and, therefore, they all agreed to amend the categorisation of pp. 9 to 62 of encl. 103 as Part B documents (*ie*, authenticity agreed but contents not agreed). The description "(B)" is added in the marking and reference to each of these pp. 9 to 62 of encl. 103 to identify them as the amended Part B documents.

[14] Prior to the commencement of the full trial the parties mutually agreed that in order to save time and costs of full trial, the following procedural steps be adopted for the conduct of full trial in this case:

(i) A witness statement deemed to be read when its contents have been confirmed on oath by the witness as true or accurate and there is no necessity for the witness to read the contents of the written witness statement into the CRT system again, provided this is without prejudice to the rule against hearsay; and

(ii) The documents in Part A and Part B categories, when expressly referred to in the witness statement or in the oral evidence, are deemed as marked in the same manner and with the same numbering as marked during the pre-trial case management, and here is no necessity to mark Part A or Part B documents with separate exhibit numbers again, provided this is without prejudice to the rule against hearsay.

[15] The full trial took four days on 1, 2, 3 and 16 November 2021.

Pleadings In The Present Case

[16] As the parties are bound by their pleadings, this court will deal with the pleaded issues in the plaintiff's statement of claim and the defendant's statements of defence.

[17] In paras. 5 to 18 of the statement of claim, the plaintiffs made allegations against the first defendant (Lee Kam Sun) regarding the transaction between them *inter se* and complained regarding the first defendant's acts and conduct. In para. 19 of the statement of claim, the plaintiff alleged that the third defendant (Complete Collection Sdn Bhd) lacked the financial capacity to buy the said shophouse and that this was evidence of suspicion and conspiracy. In para. 20 of the statement of claim, the plaintiff alleged that the first defendant (Lee KS) and the second defendant (the land office) conspired to commit the fraud or cheating. In para. 24 of the statement of claim, the plaintiff alleged in general terms that there was a conspiracy between the defendants to cheat the plaintiff. This allegation was followed by the plaintiff's pleading in para. 25 of the statement of claim that a fraudulent conspiracy existed between the defendants to refuse to register the title of the said shophouse in the plaintiff's name who was allegedly a *bona fide* purchaser and instead thereof, the said shophouse was sold to the third defendant (Complete Collection Sdn Bhd). In addition, the plaintiff also pleaded a cause of action in unjust enrichment *vis-à-vis* the first defendant (Lee KS).

[18] Both the second and third defendants, in their respective separate statements of defence, denied the plaintiff's allegations of conspiracy or fraud. The second defendant's main defence is that as the land office, it was under a duty to cooperate with the police by surrendering the documents to the police investigations and that it merely carried out its administrative functions in processing and implementing the registration of transfer in

A accordance with the outcome of the police investigations which stated that the first defendant's signatures on the documents presented by the plaintiff were forged. In the third defendant's statement of defence, its main defence is that the third defendant was a *bona fide* purchaser for value and has lawfully become the registered proprietor and that the plaintiff has not proved its case
B for defeating the registered title of the third defendant.

Plaintiff's Submissions

[19] In para. 33 of the plaintiff's written submissions, the plaintiff purported to summarise the main issues as follows:

C (i) Whether there is a valid sale and purchase agreement entered on 19 January 2012 between the first defendant and the plaintiff and whether the plaintiff had paid the purchase price and towards the redemption sum of the said property. ("the purported first issue")

(ii) Whether from the full payment towards the purchase price of the said
D property including settling the redemption sum of the said property by the plaintiff to the first defendant and whether first defendant had become a bare trustee of the said property even though the first defendant is only a beneficial owner at the material time until the registration of the name of the plaintiff as the registered owner. ("the
E purported second issue")

(iii) Whether the first defendant is permitted in law to sell or transfer the land to a new purchaser, *ie*, the third defendant after executing the sale and purchase agreement with the plaintiff and becoming a bare trustee. ("the purported third issue")

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(iv) Whether the third defendant's registered title or interest in the said property is defeasible and liable to be set aside. ("the purported fourth issue")

(v) Whether the second defendant upon rejection for registration ought to
G have returned back the documents/original documents given to the second defendant for presentation purposes back to the solicitors of the plaintiff, Messrs John & Associates. ("the purported fifth issue")

(vi) Whether the third defendant has any merits in their counterclaim. ("the purported sixth issue")

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[20] In para. 22 of the third defendant's submission-in-reply, the third defendant took the position that the alleged issues set out in the plaintiff's written submissions are not reflective of the issues stated in the issues to be tried ("SIT").

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Legal Principles Relating To Pleading Of Causes Of Action

[21] The rule of pleading is in line with the fundamental rule of natural justice, *ie*, the right to be informed of any adverse point so that one has the opportunity of stating the answer: *Muniandy & Anor v. Muhd Abdul Kader Muhd Saheed & Ors* [1989] 2 CLJ 577; [1989] 1 CLJ (Rep) 116; [1989] 2 MLJ 416 at 418. Also see *Wisma Punca Emas Sdn Bhd v. Dr Donal R O'Holohan* [1986] 1 LNS 46; [1987] 1 MLJ 393; *Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd* [1987] 1 CLJ 123; [1987] CLJ (Rep) 102; [1987] 1 MLJ 302; and *Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor* [1993] 4 CLJ 476; [1993] 3 MLJ 633.

[22] Where the material facts vital to support the claim were not pleaded, the party is not allowed to succeed in its claim based on unpleaded material facts: *AmBank (M) Bhd v. Luqman Kamil Mohammed Don* [2012] 3 CLJ 551; [2012] 3 MLJ 1 (Federal Court).

[23] In *Superintendent Of Land And Survey Department Kuching-Divisional Office & Anor v. Ratnawati Hasbi Mohamad Suleiman* [2020] 2 CLJ 425; [2020] 2 MLJ 553; [2020] 2 CLJ 425 the Federal Court held that a person who seeks to invalidate an act or land instrument or statutory instrument must expressly pray for declaration of this invalidity: see para. [44] of the judgment.

[24] In *Danga Bay Sdn Bhd v. Hamimah Hussin & Ors; Affin Islamic Bank Bhd (Third Party)* [2020] 1 LNS 1777 Azizah Nawawi JCA held as follows:

> [46] Having considered the pleadings, we agree with the defendant that the JC's apportionment of a third (1/3) liability on the defendant was not supported by the plaintiffs' pleaded case. The plaintiffs had not pleaded contributory delay on the part of the defendant to facilitate the release of the loan from Affin Bank. Therefore the learned JC had committed an error in law as his finding went outside the ambit of the plaintiff's pleaded defence to the defendant's counterclaim. It is not the duty of the learned JC to assist the plaintiff by creating the defence of contributory negligence on the part of the defendant. In RHB Bank Bhd (menggantikan *Kwong Yik Bank Berhad) v. Kwan Chew Holdings Sdn Bhd* [2010] 1 CLJ 665; [2010] 2 MLJ 188, the Federal Court held as follows at page 202:
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> > [33] Second, *the proposition of the Court of Appeal was not even pleaded by the respondent.* The respondent's cause of action against the appellant was for breach of contract. Nowhere in the respondent's pleading, expressly or by implication, can we detect a claim for breach of a joint venture agreement arising out of a fiduciary duty placed upon the appellant in the capacity as principal of an agent. *It is a cardinal rule in civil litigation that the parties must abide by their pleadings ...*

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> [35] On this, we would like to add that *it is not the duty of the court to invent or create a cause of action or a defence under the guise of doing justice for the parties lest it be accused of being biased towards one against the other.* The parties should know best as to what they want and *it is not for the court to pursue a cavalier approach to solving their dispute by inventing or creating cause or causes of action which were not pleaded in the first place.* Such activism by the court must be discouraged otherwise the court would be accused of making laws rather than applying them to a given set of facts. (emphasis added)

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> [47] In the premise, we set aside the order of the learned JC to apportion a third (1/3) or RM34,182.65 of the late interest against the defendant.

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[25] In *Joseph Paulus Lantip v. Tnio Chee Chang & Another Appeal* [2020] 4 CLJ 79; [2020] 4 CLJ 79; [2020] 5 MLJ 708 in a judgment delivered by Mary Lim JCA (now FCJ) the Court of Appeal held as follows:

> [28] *The role played by pleadings cannot be overstated. It is a fundamental principle of fair play which extends to the court, that all parties are bound by their pleadings. It would be most damaging to our administration and system of justice if parties are allowed to plead a certain complaint, lead evidence on another and the court, decides on something entirely different.* The Federal Court recently reminded and expressed the following view on the importance of proper pleadings in *Iftikar Ahmed Khan v. Perwira Affin Bank Bhd* [2018] 1 CLJ 415:

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> [29] It is settled law that parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded: *Samuel Naik Siang Ting v. Public Bank Bhd* ... In *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239 it was held that *where a vital issue was not raised in the pleadings, it could not be allowed to be granted and to succeed on appeal. A decision based on an issue which was not raised by the parties in their pleadings is liable to be set aside: ...* In *The Chartered Bank v. Yong Chan* [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330; [1990] 1 MLJ 157, the Federal Court set aside the judgment of the trial judge as it was decided on an issue not raised on the pleadings. In that case, the trial judge erred in concluding that the pleadings included a claim for breach of contract as well as a claim for libel.

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> [29] Having examined the pleaded case of the respective parties, in particular that of the plaintiff's, we are unable to find a complaint based on conversion, whether in the paragraphs identified by the learned JC or in the entire amended statement of claim.

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> [37] *It is not open to the court to fashion a cause of action or even defence for any of the parties. The plaintiff had pleaded material facts in his amended statement of claim for his particular choice of cause of action and reliefs (specific performance, injunction and damages).* The remedy of specific performance is in fact indicative of what exactly is the plaintiff's cause of action, and it clearly is associated with a claim for a breach of contract as contained in the timber sale agreement and the PAs, all by reason of misrepresentation. The plaintiff was seeking specific performance of the timber sale agreement, and the second PA.

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[38] *Although the plaintiff may claim to have a cause of action in the tort of conversion, and assuming that he did (to which we disagree as we shall explain shortly), he clearly did not pursue that cause in his pleaded claim. His cause was for breach of contract by reason of misrepresentation, which breaches the first defendant promised to rectify but supposedly did not.* Hence, the claim for specific performance. (emphasis added)

[26] In *Iftikar Ahmed Khan v. Perwira Affin Bank Bhd* [2018] 1 CLJ 415 the Federal Court held that the plaintiff's pleadings based his cause of action in negligence and as such he was not allowed to succeed on a cause of action in breach of contract. The Federal Court held as follows:

[24] The function of pleading is to give fair notice of the case which has to be met: *Rosita Baharum v. Sabedin Salleh* [1993] 2 CLJ 300; [1993] 1 MLJ 393, *Perniagaan Kinabalu (S) Sdn Bhd v. Sua Ah Yoke & Ham Jon See* [2002] 1 LNS 348; [2002] MLJU 601. This is to prevent the opposing party from being taken by surprise by evidence which departs from pleaded material facts, for such evidence if allowed, will prejudice and embarrass or mislead the opposing party: See *Superintendent of Lands and Surveys, 4th Division & Anor v. Hamit b. Matusin & Ors* [1994] 3 CLJ 567; *Raja Abdul Malek Muzaffar Shah Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 CLJ 619; [1995] 1 MLJ 308. A good pleading should contain a statement of (1) facts, not law, (2) material facts only, (3) facts, not evidence, and (4) facts stated in a summary form: See *Halsbury's Laws of England*, 4th edn, Reissue, para. 13.

[25] What are material facts? All facts which must be proved in order to establish the ground of claim or defence are material: *Philip v. Philips* [1878] 4 QBD 127 at 133, 134. Parties are bound by their pleadings. This is a rule which will be strictly enforced by the court. Thus, where a party's case is based on a contract and the other party to the contract is in breach of it, these material facts must be pleaded.

[29] It is settled law that parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded: *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944; [2015] 6 MLJ 1, *State Government of Perak v. Muniandy* [1985] 1 LNS 117; [1986] 1 MLJ 490, *Veronica Lee Ha Ling & Ors v. Maxisegar Sdn Bhd* [2009] 6 CLJ 232. In *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239 it was held that *where a vital issue was not raised in the pleadings, it could not be allowed to be granted and to succeed on appeal. A decision based on an issue which was not raised by the parties in their pleadings is liable to be set aside: Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330; [1990] 2 MLJ 152. In *The Chartered Bank v. Yong Chan* [1974] 1 LNS 178; [1974] 1 MLJ 157 the Federal Court set aside the judgment of the trial judge as it was decided on an issue not raised on the pleadings. In that case, the trial judge erred in concluding that the pleadings included a claim for breach of contract as well as a claim for libel.

A [38] The cases cited by both counsel to us clearly show that the law on the first question posed by the appellant is settled. It is this. In a case where the matter or material facts are not pleaded but evidence is led without objections at trial, the court is duty bound to consider such evidence although it may be a departure from the pleading. It has the effect of curing defect in the pleading. In such a case, the opposite party B is not taken by surprise, prejudiced, embarrassed or misled. The exception is where the evidence represents a *radical departure from the pleading and is not just a variation, modification or development of what has been alleged in the pleading. Dato' Hamzah Abdul Majid v. Omega Securities Sdn Bhd* [2015] 9 CLJ 677 is an illustration of a case where there was a radical departure from the pleading. In that case, loan, which was not a pleaded defence but C evidence of it was adduced without objection was rejected as a defence as it was a radical departure from pleading, not just a variation, modification or development of what had been alleged in the pleading. (emphasis added)

Application Of Pleading Principles To Our Present Case

D

[27] In our present case, the plaintiff has not expressly prayed for declaration of the invalidity of the registration of the transfer in favour of the third defendant. In the premises, the plaintiff has failed to comply with the requirements of pleading as decided by the Federal Court in *Superintendent Of Land And Survey Department Kuching-Divisional Office & Anor v. Ratnawati* E *Hasbi Mohamad Suleiman* (*supra*). On this ground by itself, the plaintiff should not be allowed to challenge the validity of the third defendant's title registered under the National Land Code. In the circumstances, the plaintiff's purported fourth issue would, by the principle of pleading decided by the Federal Court in *Superintendent Of Land And Survey Department Kuching-*F *Divisional Office & Anor v. Ratnawati Hasbi Mohamad Suleiman*, not be allowed to be entertained in our present case.

[28] Alternatively, this court has also dealt with substantive merits regarding the validity of the registration of transfer in favour of the third defendant. The substantive merits regarding the validity of the registration of G transfer in favour of the third defendant are discussed in a later part of this judgment.

[29] Moreover, the plaintiff's specific causes of action pleaded in his statement of claim were fraudulent conspiracy to cheat and/or alternatively H restitution under unjust enrichment. There is no express or specific pleading of any other alleged exception under sub-s. 340(2) of the National Land Code. The word "trust" or "bare trustee" was never mentioned in the statement of claim. Moreover, the plaintiff also did not plead the specific facts or circumstances which were alleged to give rise to alleged "trust" or "bare trustee". In the premises, the plaintiff is not allowed to argue his case I on the cause of action in trust or bare trustee. Any cause of action in trust

or bare trustee would constitute a radical departure from the pleading and is not just a variation, modification or development of what has been alleged in the pleading. According to the authority of the Federal Court in *Iftikar Ahmed Khan v. Perwira Affin Bank Bhd*, the plaintiff is not allowed to argue a new cause of action in trust or bare trustee which is a radical departure from his pleaded cause of action. In the premises, the plaintiff has also failed to clear the second hurdle to his defective pleading, and this is yet a second ground which by itself warrants the court's refusal to entertain his basis of claim on trust or bare trustee. In the circumstances, the plaintiff's purported second issue and the purported third issue would, by the principle of pleading decided by the Federal Court in *Superintendent Of Land And Survey Department Kuching-Divisional Office & Anor v. Ratnawati Hasbi Mohamad Suleiman*, not be allowed to be entertained in our present case.

[30] In any event, the plaintiff at the trial has failed or neglected to prove that he had, in fact, paid the purchase price of a substantial part thereof, to the first defendant. No documentary evidence of any payment of purchase price by the plaintiff to the first defendant was ever produced at the trial here. In the circumstances, the plaintiff has failed to establish facts necessary for the creation of any trust or bare trustee, even if it was pleaded or allowed to be considered on its substantive merits. This is a third reason which by itself warrants the rejection of the plaintiff's basis of claim on trust or bare trustee.

[31] This court does not accept the plaintiff's attempt to argue this case on ground of alleged illegality by the plaintiff's reference to *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 2 CLJ 75. For the court to consider an issue of illegality without it having been expressly pleaded, the illegality must appear *ex facie* on the transaction documents. In *Badiaddin*'s case, the illegality was the disposal of Malay reserved land to a non-Malay, and that fact was apparent *ex facie* the transaction documents. In our present case, the said shophouse is not on a Malay reserve land and there is nothing *ex facie* illegal in the sale and purchase agreement for the said shophouse between the first defendant and the third defendant. As such, the *ex facie* illegality as an exception to requirement of pleading does not apply to the sale and purchase agreement for the said shophouse between the first defendant and the third defendant here.

[32] In the premises, the plaintiff's claims in our present case have to be considered and decided on his pleaded causes of action in fraudulent conspiracy to cheat and in unjust enrichment, and not on any other cause of action or alleged ground for defeating the third defendant's indefeasibility of registered title.

[33] The Federal Court cases of *Yeo Ping Tieng & Ors v. Elitprop Sdn Bhd* [2020] 1 CLJ 776 and *He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal* [2020] 7 CLJ 271 cited by the plaintiff in his written submissions can be distinguished from our present case on the facts. Unlike the material facts in those Federal Court cases, the plaintiff in our present case has failed to specifically plead "trust" or "bare trustee" and has also failed to prove that he has paid the full purchase price or a substantial part thereof, to the first defendant in our present case.

Cause Of Action In Fraudulent Conspiracy To Cheat

[34] The Court of Appeal in *Cubic Electronic Sdn Bhd (In Liquidation) v. MKC Corporate & Business Advisory Sdn Bhd & Another Appeal* [2016] 3 CLJ 676 in para. [47] held that there are four elements to a claim of conspiracy: (i) a combination or agreement between two or more individuals; (ii) an intent to injure; (iii) pursuant to which combination or agreement and with that intention, certain acts were carried out; and (iv) resulting loss and damage to the claimant.

[35] The alleged fraud and conspiracy must be pleaded with the requisite particularity including the circumstances of material facts as to the questions of "who, what, where, when and how" of the alleged fraud and conspiracy (para. [54] of the Court of Appeal's judgment in *Cubic Electronic Sdn Bhd (In Liquidation) v. MKC Corporate & Business Advisory Sdn Bhd & Another Appeal*), specify with particularity each defendant's offending conduct, and the defendants cannot be grouped together without identifying which defendant has committed which wrong (para. [55] of the Court of Appeal's judgment in *Cubic Electronic Sdn Bhd (In Liquidation) v. MKC Corporate & Business Advisory Sdn Bhd & Another Appeal*); and that failure of the plaintiff to plead with particularity the constituent ingredients of its claim against the defendants ought to be met with the rejection of its statement of claim (para. [56] of the Court of Appeal's judgment in *Cubic Electronic Sdn Bhd (In Liquidation) v. MKC Corporate & Business Advisory Sdn Bhd & Another Appeal*).

[36] The Federal Court case of *Zung Zang Wood Products Sdn Bhd & Ors v. Kwan Chee Hang Sdn Bhd & Ors* [2014] 2 CLJ 445; [2014] 2 MLJ 799, where the Federal Court emphasised the importance of specific particulars where an allegation of fraud is pleaded. See also the case of *Associated Leisure Ltd (Phonographic Equipment Ltd) & Ors v. Associated Newspapers Ltd* [1970] 2 QB 450 and *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors And Another Case* [1995] 3 CLJ 639; [1995] 2 MLJ 770 where the Court of Appeal stated that in a case of fraud or conspiracy to defraud, the plea of fraud or conspiracy in a party's pleadings must be supported by full particulars.

[37] In the circumstances of our present case, the plaintiff has failed to plead the alleged fraudulent conspiracy with requisite particularity which is required by the law as decided by the Court of Appeal in *Cubic Electronic Sdn Bhd (In Liquidation) v. MKC Corporate & Business Advisory Sdn Bhd & Another Appeal*). A

[38] On this ground of pleading alone, the plaintiff's claim on alleged fraudulent conspiracy should be rejected and dismissed with costs. B

[39] Further or alternatively, the plaintiff here has failed to prove that there was any combination or agreement between the second defendant (the land office) and either of the first defendant (executor of the original deceased proprietor) or the third defendant (the purchaser) in connection with the registration of caveats, rejection of the plaintiff's caveat presentation, rejection of the plaintiff's transfer presentation and/or the registration of transfer presented by the second defendant. C

[40] Moreover, the plaintiff here has also failed to prove that there was any combination or agreement between the second defendant and either of the first defendant or the third defendant to injure the plaintiff or that there was any act done pursuant to such combination or agreement. D

[41] The second defendant, by surrendering the transfer presentation documents to the police for investigation into a police report on alleged forgery, merely complied with the law. Subsequently, the second defendant's rejection of the plaintiff's presentation of transfer and by accepting the third defendant's presentation of transfer and by registering the transfer of the said shophouse in the name of the third defendant was done in accordance with the outcome of the police investigation as notified officially by the police to the second defendant, and, therefore, the second defendant did not act fraudulently or improperly or negligently in doing so. E F

[42] Moreover, at the time of the second defendant's acceptance of the third defendant's presentation of transfer for registration, the plaintiff's solicitors had already withdrawn their presentation for registration of transfer /transmission from the deceased mother to her son the first defendant (see Messrs John & Associates' letter dated 12 June 2014 to the land office: AB1/104; evidence of PW2 Low Ah Chai on 2 November 2021 under cross-examination by the third defendant's counsel) and the police had already informed the second defendant that the outcome of the police investigation was that the first defendant's signatures in the agreement and transfer forms relied upon by the plaintiff were forgery (see letter dated 22 October 2015 from the police to the land office: AB2/78, 96). Prior to the second defendant's registration of the transfer of title to the third defendant's name, by letter dated 26 October 2015 informed Messrs John & Associates that the latter's presentation of memorandum of transfer, caveat removal, *etc*, was rejected because police investigation showed the vendor's signature on the memorandum of transfer was forged: AA1(B)/13-16. G H I

[43] At the trial the plaintiff did not call any forensic expert to give evidence as to the first defendant's signatures. Neither has the plaintiff produced any other documents which bear the first defendant's genuine signatures for this court to examine, compare and decide the alleged authenticity of the signatures as the first defendant's signatures in the agreement and transfer form relied upon by the plaintiff here. Apart from the impugned signatures of the first defendant, the plaintiff's alleged sale and purchase transaction with the first defendant also suffered from features which are abnormal for a sale and purchase transaction, including the features of (i) the plaintiff's failure to lodge a private caveat despite lapse of many months from the alleged date of signing the agreement, (ii) alleged payment without any involvement of the plaintiff's solicitors Mesrs Koh & Rafidah whatsoever (see PW1 Justin Too's evidence on 1 November 2021 during cross-examination by the third defendant's counsel that "in this case, money did not come through our firm" and that he did not see any record of payment and he did not know how the alleged payment was made), (iii) PW1 Justin Too's oral evidence that he did not know what went through between the plaintiff and the first defendant, that the plaintiff and the first defendant did it by way of contra and subsequently PW1 said he retracted the word "contra" (see PW1 Justin Too's on 1 November 2021 during cross-examination by the third defendant's counsel). From this court's observation of PW1's demeanour and his oral evidence, PW1 seemed to be hiding some truth behind the face of the purported transaction between the plaintiff and the first defendant. This has left this court very much in doubt as to whether the purported transaction between the plaintiff and the first defendant was a genuine sale and purchase transaction.

[44] This court finds that in the circumstances of the present case there is no proof that Messrs John & Associates were instructed or authorised by the executors of the deceased proprietor's estate to act for the executors in purporting to make a presentation of transfer documents or conveyancing documents on behalf of the executors to the land office (the second defendant). It is to be noted that Messrs John & Associates took over the file from another law firm but Messrs John & Associates did not have any actual instruction or consent from the first defendant to act: see PW3 Low Ah Chai's oral evidence on 2 November 2021. During cross-exmination by the second defendant's counsel on 2 November 2021, PW3 Low Ah Chai stated that when Messrs John & Associates took over the matter from Messes Koh & Rafidah, Messrs Koh & Rafidah told Messrs John & Associates to "Take over the transaction; carry on the transaction". DW2 Low admitted that there was no letter or document from the administrators (the first defendant Lee KS and Madam Ewe) to appoint any law firm as solicitors for the transaction, and that there was no document from the bundles of documents to show Messrs Koh & Rafidah's instruction to Messrs John & Associates to

act for the administrators of the deceased's estate. Under cross-examination by the second defendant's counsel on 1 November 2021, PW1 Justin Too admitted that Messrs Koh & Rafidah acted for the plaintiff only and never acted for the first defendant. This court finds it was rather presumptuous for Messrs John & Associates to make presentation to the land office by purportedly claiming to act for the first defendant or the deceased's estate.

[45] In the circumstances of the present case, the second defendant (the land office) was merely carrying out its functions in connection with registration of land dealings under the National Land Code.

[46] In the premises, the plaintiff's claim of alleged fraudulent conspiracy against the second defendant (the land office) should also be dismissed on grounds of the lack of proof of the ingredients of fraudulent conspiracy.

[47] As regards the plaintiff's claim of alleged fraudulent conspiracy against the third defendant, this court finds that there was a sale and purchase agreement between the first defendant (the executor of the original deceased proprietor) and the third defendant (the purchaser), the agreement was a genuine agreement for sale and purchase of the said shophouse at a purchase price of RM3,300,000 (see AB1/67-79; AB1/171-184; WS-DW1 Q&A 4, 6). The third defendant bought the said shophouse for the market value (as evidenced by valuation report in AB1/192-205; WS-DW3 Cheah, Q&A 14 & 15), paid part of the purchase price by using its own money (AB1/185; WS-DW3 Cheah, Q&A 8-10) and took a substantial bank loan of RM2,805,000 to part-finance the purchase (AB1/144-155, AB1/186-191; AB2/206-207; WS-DW3 Cheah, Q&A 11-13, 22; DW2 Benny Soh's evidence on 3 November 2021), did the necessary land searches before making the purchase and acted through solicitors and found that there was no private caveat lodged by the plaintiff Ong Led Seng (see land search dated 21 January 2014 in AA1(B)/43-45; land search dated 5 November 2014 in AA1(B)/46-47). The lender-bank has also been registered as the charge of title of the said shophouse as security for the bank loan granted to the third defendant. (AB2/68-69; AA1(B)/37-42).

[48] DW2 Benny Soh, the solicitor who handled the conveyancing matter on behalf of the third defendant, testified that the third defendant's purchase of the said shophouse was a genuine transaction which was carried out properly and regularly (DW2's evidence on 3 November 2021). This court finds that DW2 Benny Soh is a credible and reliable witness.

[49] Moreover, para. 7 of the agreed facts between the plaintiff and the third defendant (filed by the plaintiff's solicitors) stated that the existence of the plaintiff as well as the alleged transaction between the plaintiff and the first defendant and Ewe Chooi Lian was not known to the third defendant whatsoever at all material times: see SAF (D3). See also WS-DW1 Q&A 23-25.

[50] This court finds that the plaintiff has failed to prove that there was any combination or agreement between the third defendant (the purchaser) and the first defendant (executor of the original deceased proprietor) to injure the plaintiff.

[51] This court finds that the plaintiff has failed to prove that the third defendant (the purchaser) has done any act pursuant to any combination or agreement to injure the plaintiff. What the third defendant did was the lawful and *bona fide* acts of negotiating for and implementing the sale and purchase of the said shophouse for valuable consideration.

[52] In the circumstances, this court finds that the plaintiff has failed to prove his case of alleged fraudulent conspiracy against the third defendant (the purchaser).

[53] In the premises, this court hereby dismisses the plaintiff's claim of alleged fraudulent conspiracy against the third defendant.

[54] After this court has dismissed the plaintiff's claims of alleged fraudulent conspiracy *vis-à-vis* the second defendant as well as the third defendant, the first defendant (Lee Kum Sun) is left as the only remaining co-defendant against whom alone there can be no basis for finding any cause of action in fraudulent conspiracy. Fraudulent conspiracy can only possibly exist where there are two or more people who have made an agreement or combination to injure and have acted in pursuance of that combination or agreement to cause injury. With the first defendant (Lee Kum Sun) as the only co-defendant who has not been exonerated, the plaintiff's claim of fraudulent conspiracy against the first defendant (Lee Kum Sun) also fails.

Whether The Third Defendant's Sale And Purchase Agreement Was Void For Alleged Non-compliance With s. 132C Of The Companies Act 2016

[55] On the point of pleadings, this court has held in an earlier part of this judgment that the plaintiff's argument on alleged voidness or invalidity of the sale and purchase agreement between the first defendant and the third defendant (the purported fourth issue) cannot be entertained by this court.

[56] In the submission, the plaintiff also embarked on the argument that the third defendant allegedly did not pass its company resolutions for the sale and purchase transaction and the loan transaction. This allegation was not specifically pleaded by the plaintiff and was hurled against the third defendant's first witness DW1 Cheah Chi'a Ngi in a surprise during the trial contrary to the principles of pleadings. This court finds that such surprising allegation cannot be entertained here.

[57] Further or alternatively, when it was the conveyancing solicitor DW2 Benny Soh Seow Leng's turn to testify, DW2 Benny Soh testified that the third defendant's company resolutions were in fact passed for the sale and

purchase transaction and for the loan transaction and he referred to the specific documentary in substantiation thereof (see Manjeet Singh's letter dated 2 November 2015 in AB1/131-132 wherein item 7 referred to Forms 24, 44, 49 and memorandum and articles of association and item 8 relate to company's resolution for purchase and transfer of property). This court accepts DW2 Benny Soh's testimony that the company's resolutions are so basic a required condition precedent for the bank's drawdown of the loan and that where the loan has been disbursed, definitely the bank would have these company resolutions and certified true copies of the forms in hand. In the circumstances, this court finds as a fact on balance of probabilities that the third defendant has passed the company resolutions for the sale and purchase transaction and for the loan transaction in respect of the said shophouse.

[58] In the circumstances, even if this court were to issue the question of defects in the plaintiff's pleadings, the plaintiff's argument on alleged voidness or invalidity of the sale and purchase agreement between the first defendant and the third defendant would still be rejected on the facts of our present case.

[59] The Federal Court case of *Tan Chee Hoe & Sons Sdn Bhd v. Code Focus Sdn Bhd* [2014] 3 CLJ 141; [2014] 3 MLJ 301 cited by the plaintiff in his written submissions can be distinguished from our present case on the facts. Unlike the material facts in that Federal Court case, the plaintiff in our present case has failed to specifically plead material facts for alleging the voidness or invalidity of the third defendant's agreement and has also failed to expressly pray for a declaration of invalidity of the third defendant's agreement. Moreover, from the evidence adduced in our present case, the third defendant had proved on a balance of probabilities that the third defendant had passed the necessary company resolutions and furnished them to the chargee bank before the end-financing loan was disbursed.

Indefeasibility Of Registered Title

[60] The Federal Court in the case of *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944 that:

> [84] The principle established in *Tan Ying Hong* was adopted and followed by this court in a recent case of *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987; [2014] 2 MLJ 768 where at para. 43, Jeffrey Tan FJ said:
>
> In the instant case, both the trial court and the Court of Appeal held that the fifth and sixth respondents were *bona fide* purchasers. But unfortunately, both the trial court and the Court of Appeal failed to inquire whether the fifth and or sixth respondents were immediate or subsequent purchasers. Only a subsequent purchaser is entitled to raise the shield of indefeasibility. An immediate purchaser of a title tainted by any one of the vitiating elements acquires a title that is not indefeasible.

A It flows from *Tan Ying Hong* that the *bona fides* of an immediate purchaser is not a shield to defeasibility. The defeasible title of a *bona fide* immediate purchaser is still liable to be set aside. The defeasible title of a *bona fide* immediate purchaser only becomes indefeasible when it is subsequently passed to a *bona fide* subsequent purchaser. That the fifth and sixth respondents were *bona fide* purchasers could not by that fact alone give a B shield of indefeasibility. The fifth and or sixth respondents only acquired an indefeasible title if they were *bona fide* subsequent purchasers. But for the fifth and sixth respondents to have been *bona fide* subsequent purchasers, there must have been an immediate purchaser in the first place.

C The first to fourth respondents, from whom the fifth and sixth respondents obtained title, were not immediate purchasers. Rather, they were imposters of those entitled to the estate of the deceased. They, like the fake Boonsom who impersonated the true Boonsom, had no title to pass to the fifth and sixth respondents. The fifth and sixth respondents who were the immediate purchasers, acquired a title that was not D indefeasible. But when the fraudulent title of the first to fourth respondents were set aside by the default judgment, the defeasible title of the fifth and sixth Respondents was also defeated.

[85] In the present case, as we have stated earlier the relevant Form 14A in respect of the transfer of the title to the appellant was a void instrument E and therefore the appellant's title and interest in the lot was indisputably defeasible. The appellant was an immediate purchaser of the lot in question from its registered proprietor, MPM. That being the case the appellant clearly could not enjoy the benefit of the proviso to sub-s. (3). Once the court is satisfied that the transfer of the title to the appellant arose from a void instrument, to borrow the words of Arifin Zakaria CJ F (Malaya) in *Tan Ying Hong*, "it automatically follows that they are liable to be set aside".

[61] The Federal Court in the case of *See Leong Chye & Anor v. United Overseas Bank (Malaysia) Bhd & Another Appeal* [2021] 6 CLJ 650; [2021] 5 MLJ 759 at pp. 685 to 687 (CLJ); pp. 798 to 799 (MLJ) held that:

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[64] The seven subsequent decisions of this court after Tan Ying Hong underscore the problems faced by trial courts when adjudicating on the issue of indefeasibility of a title or interest in land, and the related issue of whether a party is an immediate or subsequent purchaser. In our view, the aforesaid cases are illustrative of this court's adherence to the settled H law on deferred indefeasibility and its application to the particular facts of each case. The *ratio decidendi* which emanates therefrom may be distilled as follows:

…

I

(iii) A purchaser of land who has paid the full purchase price becomes the beneficial owner of the land; and the vendor who has received the full purchase price becomes the bare trustee for the purchaser. As a bare trustee, the vendor has no capacity in law to sell or transfer the land to any third party. A third party who acquires the land from such a vendor ranks as an immediate purchaser whose title is defeasible under sub-s. 340(2) of the NLC. The third party's title can be defeated by a prior non-registered interest of an equitable mortgagee under a deed of assignment in respect of the same piece of land: *Samuel Naik*

…

(v) The law recognises and enforces an overriding rule that in making and carrying out conveyancing transactions that commonly deals with a number of transactions and dealings to transfer real property, parties should act in good faith. Good faith does not simply mean absence of fraud, deceit or dishonesty; it also requires acting honestly, reasonably or fairly. An element of carelessness or negligence on the part of a purchaser negates good faith. Knowledge of a dispute as to the ownership of property and knowledge of fraud allegation could vitiate good faith. Good faith is also negated if a purchaser is not complicit in the fraud but has knowledge of the fraud affecting the title to the land. Ultimately, the elements of good faith are not closed and it depends on the circumstances of each case: *T Sivam Tharamalingam*

…

(viii) A vendor who has been paid the full purchase price for the land (for which issue document of title has not yet been issued) holds the land as a bare trustee for the purchaser. As such, notwithstanding that the issue document of title is subsequently issued in the vendor's name, the vendor is incapable of any further dealing with the land. A bank who takes a charge on the land from the vendor is an immediate purchaser whose interest is defeasible under sub-s. 340(2) of the NLC. The charge is liable to be set aside because the proviso to sub-s. 340(3) of the NLC is not applicable to the charge of an immediate purchaser. The fact that the bank is a *bona fide* purchaser for value is immaterial: *He-Con Sdn Bhd*.

[62] In referring to the above-mentioned passages of the Federal Court's decisions in *Samuel Naik Siang Ting* case and *See Leong Chye* case, the plaintiff argued that "the law is trite that an immediate purchaser's title and interest in a property is defeasible and liable to be set aside". In the considered view of this court, the plaintiff's said argument has misinterpreted the court judgments out of context and such argument is an erroneous and incomplete statement of the law on indefeasibility of title in relation to immediate purchaser.

[63] Section 340 of the National Land Code provides as follows:

Registration to confer indefeasible title or interest, except in certain circumstances

340(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

(2) The title or interest of any such person or body shall not be indefeasible:

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in subsection (2):

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

(4) Nothing in this section shall prejudice or prevent:

(a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or

(b) the determination of any title or interest by operation of law.

[64] Reading the decided cases in the context and s. 340 of the National Land Code in its entirety, the correct positions on the law of indefeasibility of registered titles or interests can be summarised and analysed as follows:

(i) As a general rule, registration of title confers indefeasibility of title: sub-s. 340(1);

(ii) The general rule is subject to several exceptions where the existence of any of the vitiating circumstances would render the registered title defeasible: sub-s. 340(2);

(iii) Where none of the exception under sub-s. 340(2) has been proved in the court of law, the general rule of indefeasibility under sub-s. 340(1) will still apply;

(iv) Where an exception under sub-s. 340(2) has been proved in the court of law, that by itself does not automatically and invariably render the registered title defeasible. The proof of an exception under sub-s. 340(2) will result in the title remaining indefeasible or becoming defeasible depending on whether the exclusion under the proviso to sub-s. 340(3) applies. The proviso to sub-s. 340(3) applies where the person with the registered title is a subsequent purchaser who acquired the title in good faith and for valuable consideration;

(v) Where the proviso to sub-s. 340(3) applies (*ie*, the person with the registered title is a subsequent purchaser who acquired the title in good faith and for valuable consideration), the subsequent purchaser's title remains indefeasible even if the vitiating circumstance for an exception under sub-s. 340(2) has been proved in the court of law;

(vi) Where the proviso to sub-s. 340(3) does not apply (*ie*, the person with the registered title is not a subsequent purchaser who acquired the title in good faith and for valuable consideration), the purchaser's registered title becomes defeasible if the vitiating circumstance for an exception under sub-s. 340(2) has been proved in the court of law; however, the said purchaser's registered title remains indefeasible if the vitiating circumstance for an exception under sub-s. 340(2) has not been proved in the court of law, as the position will in such event revert to the general rule of indefeasibility under sub-s. 340(1);

(vii) It is only where the vitiating circumstance for an exception under sub-s. 340(2) has been proved in the court of law that the registered title would be brought under an exception to the general rule of indefeasibility under sub-s. 340(1), in which event the person with the registered title would have to find his/her shield of indefeasibility under the proviso to sub-s. 340(3), *ie*, proving himself/herself as a subsequent purchaser who acquired the title in good faith and for valuable consideration; and

(viii) The same rule, exceptions and shield of proviso also apply similarly to registered interests.

[65] In the circumstances, as proven by the evidence of the third defendant, this court finds that the third defendant is a *bona fide* purchaser for valuable consideration. Although the third defendant is not a subsequent purchaser, the plaintiff has not proved any case of exception under sub-s. 340(2) of the National Land Code to justify the court in defeating the registered title of the third defendant.

[66] As the third defendant has been registered as the proprietor of the said shophouse and the plaintiff has failed to prove its case of alleged fraudulent conspiracy, the third defendant's registered title is indefeasible because no exception to indefeasibility under sub-s. 340(2) has been proved and, therefore, the position remains the same under the general rule of indefeasibility off registered title under sub-s. 340(1) of the National Land Code.

[67] Apart from fraud in the context of fraudulent conspiracy, the plaintiff has not pleaded any other exception to indefeasibility of title under sub-s. 340(2) of the National Land Code. Moreover, the plaintiff also has not adduced specific evidence to bring his case under any exception to indefeasibility of title under sub-s. 340(2) of the National Land Code.

[68] As the third defendant has been registered as the proprietor of the said shophouse and the plaintiff has failed to prove its case of alleged fraudulent conspiracy which he has pleaded, the third defendant's registered title is indefeasible. The inapplicability of sub-s. 340(2) exceptions has rendered it unnecessary for the third defendant to find another shield of indefeasibility under the proviso to sub-s. 340(3).

[69] As the third defendant has been registered as the proprietor of the said shophouse and the plaintiff has failed to prove its case of alleged fraudulent conspiracy, the third defendant's registered title is indefeasible.

[70] The Federal Court cases of *Samuel Naik Siang Ting* and *See Leong Chye* were decided on facts which are materially different from the facts of our present case.

Delay Or Laches In Relation To Declaratory Or Injunctive Reliefs

[71] Declaratory relief and injunctive relief being equitable and/or discretionary reliefs, an applicant for such reliefs has to proceed with diligence and without undue delay. Delay or laches can by itself be a ground for the court's refusal to grant declaratory or injunctive relief.

[72] Paragraph 7 of the statement of agreed facts (between the plaintiff and the third defendant) states as follows: "Plaintif telah mengambil masa lebih daripada enam tahun iaitu semenjak 19 Januari 2012 sebelum mengambil tindakan untuk menuntut sebarang haknya berhubung hartanah tersebut, jika ada".

[73] In spite of having a purported sale and purchase agreement dated 19 January 2012 with the first defendant allegedly in connection with the said shophouse, the plaintiff did not promptly lodge any private caveat to protect his alleged interest. When the third defendant purchased the said shophouse from the first defendant *vide* a sale and purchase agreement dated

14 March 2014 (about 26 months after 19 January 2012), there was still no private caveat lodged by the plaintiff onto the title for the said shophouse. (see evidence of DW2 Benny Soh Seow Leng's evidence; land search dated 21 January 2014 in AA1(B)/43-45; land search dated 5 November 2014 in AA1(B)/46-47).

[74] This long delay on the part of the plaintiff in pursuing any enforcement of the plaintiff's purported sale and purchase agreement dated 19 January 2012 throws serious doubt as to the *bona fides* of the plaintiff in respect of the alleged purchase of the said shophouse and also has raised laches against the plaintiff, thereby raising an additional ground for this court to refuse to grant the declaratory relief or equitable relief to the plaintiff.

Cause Of Action In Unjust Enrichment

[75] In our present case, the plaintiff by para. 26 of the statement of claim made allegation of unjust enrichment only *vis-à-vis* the first defendant (Lee KS). There is no pleading or prayer for damages for unjust enrichment against either the second defendant or the third defendant.

[76] There is also no evidence that the third defendant (the purchaser) has in any way, been enriched after having paid RM3,300,000 as the price for the said shophouse and after having been burdened with the repayment obligations in respect of the bank loan taken for the purchase of the said shophouse. The plaintiff has also failed to produce any evidence to prove that the third defendant's purchase price paid to the first defendant was at any discount below the fair market value of the said shophouse.

[77] In the circumstances, the plaintiff has failed to prove that the third defendant has been enriched or that the enrichment (if any) is in any way unjust.

[78] In the premises, this court dismisses the plaintiff's claim of alleged unjust enrichment against the second defendant and the third defendant.

[79] As regards the plaintiff's claim of unjust enrichment against the first defendant (the executor of the original deceased proprietor), the plaintiff has not produced documentary proof of the alleged payments said to have been made to the first defendant.

[80] In para. 27(j) of the statement of claim the plaintiff has prayed for damages against the first defendant (Lee Kum Sun) to be assessed by the court.

[81] The plaintiff has filed affidavit of service of the writ and statement of claim and has notified the first defendant of the hearings and trial dates. In the present case the first defendant did not enter appearance, did not file any statement of defence and also did not attend court at the trial.

[82] In his submission, the plaintiff has applied for judgment in default to be entered against the first defendant.

[83] The plaintiff's affidavit of service asserted that the writ and statement of claim was served on the first defendant. Throughout the proceedings, the first defendant failed to be present in court. Nor did he file his memorandum of appearance or statement of defence.

[84] The plaintiff's solicitors informed him officially by way of a letter dated the 4 October 2021 posted *via* certificate of posting. The same had been e-filed in court as encl. 112.

[85] In *Ting Ung Tuang v. Lau Tiong Ik Construction Sdn Bhd* [2001] 4 CLJ 116; [2001] 6 MLJ at p. 123 (CLJ); p. 324 (MLJ) the court held as follows:

> Although the Supreme Court was there dealing with a case concerning a default judgement under O. 19 r. 3 (for unliquidated damages), what was stated in that case would apply with equal force to a situation under O. 19 r. 2, because whether Plaintiff's claim is for a liquidated demand only or unliquidated damages, in both instances, once a defendant makes default in serving a defence, the plaintiff to "enter" final Judgement ... there is no need for a plaintif who wishes to enter judgement in default of defence to first send to the solicitors acting for that defendant a draft Judgement, before doing so.

[86] As the claim against the first defendant (Lee Kum Sun) is for unliquidated damages (*ie*, damages for be assessed by the court), this court hereby enters judgment in default of defence against the first defendant (Lee Kum Sun) in favour of the plaintiff in respect of unjust enrichment, and orders that the damages for unjust enrichment shall be assessed by the court.

Third Defendant's Counterclaims

[87] In the defence and counterclaim by the third defendant, the third defendant prayed for general and special damages against the plaintiff for commencing this suit which allegedly prejudiced the third defendant's credit rating and the third defendant's ability to make subsequent dealing with the said shophouse.

[88] However, the third defendant's witnesses have not adduced specific evidence regarding the alleged loss or damages of the third defendant.

[89] In the premises, this court has not allowed the third defendant's counterclaim for alleged damages.

Conclusion

[90] In conclusion, this court on 22 December 2021 dismissed the plaintiff's claims against the second defendant and the third defendant with costs.

[91] In view of the first defendant's default in appearance and defence, this court granted judgment in default for the plaintiff against the first defendant in respect of unjust enrichment, with damages to be assessed.

[92] This court also assessed the costs of action at RM20,000 and RM30,000 in favour of the second defendant and the third defendant respectively to be paid by the plaintiff, subject to allocator.